STATE OF MICHIGAN

COURT OF APPEALS

CINDY L. ARNOLD,

Plaintiff-Appellee,

v

MICHAEL J. ARNOLD,

Defendant-Appellant.

UNPUBLISHED
February 17, 2005

No. 249953
Wayne Circuit Court
LC No. 02-220351-DM

Before: Murray, P.J., and Meter and Owens, JJ.

PER CURIAM.

Defendant appeals the trial court's judgment of divorce. We affirm.

Defendant first argues that the trial court erred in using an imputed annual income of $30,000, instead of his actual annual income of approximately $9,000, to determine the amount of his child support payments. A trial court's determination to impute income is reviewed for an abuse of discretion. *Rohloff v Rohloff*, 161 Mich App 766, 776; 411 NW2d 484 (1987). The trial court did not abuse its discretion in determining that defendant had the ability to earn $30,000 annually.

The amount of child support to be paid by a noncustodial parent is "based upon the needs of the child and the actual resources of each parent." MCL 552.519(3)(a)(*vi*) "Actual resources" means not only a parent's actual income, but also a parent's unexercised ability to pay. *Ghidotti v Barber*, 459 Mich 189, 198; 586 NW2d 883 (1998). Before a court may impute income, our Supreme Court requires an examination by the trial court of the party's:

1. Employment history, including reasons for any termination of employment.

2. Education and skills.

3. Work opportunities available.

4. Diligence employed in trying to find work.

5. Defendant's personal history, including present marital status and present means of support.

6. Assets, real and personal, and any transfer of assets to another.

7. Efforts made to modify the decree if it is considered excessive under the circumstances.

8. Health and physical ability to obtain gainful employment.

9. Availability for work (exact periods of any hospitalization, jail time, imprisonment).

10. Location(s) of defendant since decree and reason(s) for move(s), if there has been any change of address. [*Sword v Sword*, 399 Mich 367, 378-379; 249 NW2d 88 (1976), overruled in part on other grounds *Mead v Batchlor*, 435 Mich 480, 506; 460 NW2d 493 (1990).]

"The requirement that the trial court evaluate criteria such as those listed in *Sword* is essential to ensure that any imputation of income is based on actual ability and likelihood of earning the imputed income. Any other rule would be pure speculation and a clear violation of the requirement that child support be based upon the actual resources of the parents." *Ghidotti*, *supra* at 199. Moreover, the Michigan Child Support Formula Manual requires the decision to impute income to be based on the evaluation of the following eight factors:

1. Prior employment experience;

2. Education level;

3. Physical and mental disabilities;

4. The presence of children of the marriage in the party's home and its impact on the earnings of the parties;

5. Availability of employment in the local geographical area;

6. The prevailing wage rates in the local geographical area;

7. Special skills and training; or

8. Whether there is any evidence that the party in question is able to earn the imputed income. [*Id*. at 199.][1]

Applying the factors enumerated above to the facts of this case, we find that the trial court did not err in imputing an income of $30,000 to defendant. Defendant has demonstrated both a capacity to work full-time and to earn more than $30,000 per year. He was employed in the computer science industry for seven years. His final salary was $32,000. At one time,

[1] See also 2001 MCSF II (I).

defendant was also employed full-time as a teacher, despite lacking teacher certification. Despite defendant's ability to obtain full-time employment in either field, defendant has failed to do so.

Defendant is a highly educated man with two bachelor degrees who is continuing his education by pursuing teacher certification. He has no physical or mental disabilities that prevent him from working full-time, nor have there been periods of unemployment due to hospitalization or incarceration. Defendant's parenting time with his children does not restrict his ability to earn an income because he cares for them only during hours in which he is not working. Therefore, the trial court did not abuse its discretion in imputing an income of $30,000 to defendant. Furthermore, the court did not err in ordering defendant to pay thirty-five percent of his children's private school tuition and expenses and unreimbursed medical expenses. The court's apportionment of these expenses was based on the ratio of plaintiff's and defendant's incomes.

Defendant next argues that the trial court erred by not awarding defendant and plaintiff an equal number of overnight visits with their children. A trial court's child custody orders and judgments are affirmed on appeal "unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue." MCL 722.28.

Defendant was awarded alternate weekends with his children from Friday after school until Sunday at 7:00 p.m., one overnight visit a week on the weeks opposite his weekend visits, every afternoon after school until 4:30 p.m., alternate holidays, his birthday, Father's Day, the days during the school year on which the children do not have classes and plaintiff is working, and, during the summer, while the plaintiff is working, defendant has parenting time from 7:30 a.m. until 4:30 p.m. Defendant was also awarded two uninterrupted weeks with his children each summer in one-week increments. Additionally, plaintiff and defendant share their children's birthdays and school breaks at Thanksgiving, Christmas, Easter, and mid-winter.

Parenting time is to be granted according to the best interests of the child. A strong relationship between a child and both parents is presumed to be in the child's best interests. Thus, parenting time must be granted to a parent "in a frequency, duration, and type reasonably calculated to promote a strong relationship between the child and that parent." MCL 722.27a(1). The trial court gave defendant ample time with his children in which to maintain the strong relationship he has already formed with his children. Equal time is not mandated by Michigan law.

Moreover, in developing the parenting order, the trial court endeavored to continue the schedule developed and followed by plaintiff and defendant before and following their separation. This is mandated by MCL 722.27(1)(c), which requires the trial court to follow an established custodial environment "unless there is presented clear and convincing evidence that it is in the best interests of the [children]" to deviate from the established environment. A custodial environment of a child is considered established when "over an appreciable time the child naturally looks to the custodian in such environment for guidance, discipline, the necessities of life and parental comfort." *Baker v Baker*, 411 Mich 567, 577; 309 NW2d 532 (1981). See also MCL 722.27(1)(c).

The trial court properly found that an established custodial environment existed in both parents before and after their separation. Before the separation and after defendant began working part-time, defendant performed many of the daily activities and duties with the children while plaintiff was at work. Evening duties were shared by defendant and plaintiff. Plaintiff took the children to school, and defendant picked the children up from school. A similar routine continued after the separation. Plaintiff took the children to school. Defendant picked the children up from school and cared for them until plaintiff finished work. The children spent week nights with their mother. Weekend time was shared. The court's parenting time order merely continued the established custodial environment as mandated by MCL 722.27(1)(c). The trial court did not err in its formulation of parenting time.

Finally, defendant argues that the trial court erred in ordering him to pay a portion of his children's private school tuition and expenses without stating that his obligation would end when each child finished eighth grade. A trial court's findings of fact may not be set aside unless they are clearly erroneous. MCR 2.613(C). Defendant did not preserve this issue for trial, nor did he properly present it. Defendant's argument is that his tuition obligations should end at the eighth grade because the trial court found that plaintiff and defendant had agreed to provide private school for their daughters only until eighth grade. This is expressly contradicted by the transcript of the hearing in which the trial court stated that the parties agreed to provide Catholic education for their children *at least* through the eighth grade (emphasis added). The court did not err in ordering that "whatever their agreement is, then they should bear the cost of the private school tuition in proportion to the incomes as I have indicated."

Affirmed.

/s/ Christopher M. Murray
/s/ Patrick M. Meter
/s/ Donald S. Owens